YAP YOKE CHONG v. YAP CHEE SIANG

HIGH COURT MALAYA, KUALA LUMPUR
HAYATUL AKMAL ABDUL AZIZ J
[CIVIL SUIT NO: WA-22NCVC-45-01-2020]
29 MAY 2024

Abstract – *A litigant is entitled to have a prior judgment set aside if it can be shown that the said judgment has been obtained by fraud. There is no necessity to show that the fresh evidence relied upon could not have been obtained without reasonable diligence. When a judgment or order is obtained by fraud, or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh collateral action will lie to impeach the original judgment. The court has the jurisdiction to set aside a judgment obtained by fraud in a collateral action brought for that purpose. The doctrine of res judicata is not applicable in a separate and original action to impeach and set aside an earlier judgment which has been obtained by deception or under fraudulent circumstances practiced upon the court. Once fraud is proven, it vitiates judgments, contracts and all transactions.*

CIVIL PROCEDURE: *Judgments and orders – Impeachment – Judgment obtained by way of fraud – Court fraudulently misled into granting judgment – Consequence of judgment revoked letters of administration granted to rightful beneficiaries of estate – Discovery of fraudulent materials that were not available at time of trial – Whether due to lack of reasonable diligence – Whether res judicata or estoppel apply in action to impeach judgment for fraud – Whether evidence had determining effect on outcome of impugned judgment – Evidence Act 1950, s. 44*

EVIDENCE: *Fresh or further evidence – Impeachment – Judgment obtained by way of fraud – Court fraudulently misled into granting judgment – Consequence of judgment revoked letters of administration granted to rightful beneficiaries of estate – Discovery of fraudulent materials that were not available at time of trial – Whether due to lack of reasonable diligence – Whether res judicata or estoppel apply in action to impeach judgment for fraud – Whether evidence had determining effect on outcome of impugned judgment – Whether there was necessity to show that fresh evidence relied upon could not have been obtained without reasonable diligence – Evidence Act 1950, s. 44*

The plaintiff, Yap Yoke Chong ('YYC') filed the present suit ('Suit 45') seeking to impeach a High Court judgment in Civil Suit No: 22NCVC-676-12-2015 ('Suit 676'). In Suit 676, one Yap Ngen Sang ('YNS') sought a declaration against YYC and one Leong Theam Fook to revoke the letters of administration granted to YYC or YNS be added as a beneficiary. YYC had very much earlier on been appointed as the administrator of the estate

of Madam Sam Poh San @ Shum Poh Sum ('Madam Sam'). The High Court in Suit 676 found in favour of YNS and granted the judgment sought. Aggrieved with the High Court order, YYC appealed to the Court of Appeal. The Court of Appeal dismissed the appeal and affirmed the High Court judgment. It rendered the High Court judgment final and binding between the parties in Suit 676. Nine months after the Court of Appeal's determination, YNS passed away, leaving his estate and his contested entitlement in the estate of Madam Sam under the administration of his son, Yap Chee Siang as the executor under the grant of probate issued by the High Court. Aggrieved with the outcome at the High Court and the Court of Appeal in Suit 676, YYC/the plaintiff filed the present Suit 45 to impeach Suit 676. The foundation of the proposed impeachment of the High Court judgment in Suit 676 was that: (i) the High Court had been fraudulently misled into granting the judgment. The fraudulent materials were uncovered after the plaintiff underwent many difficulties that were not available at the time of the trial of Suit 676. It was not due to his lack of reasonable diligence; (ii) the evidence by YNS on the tombstones purportedly of the late Madam Sam and one Yap Chin Fook ('YCF') that were, amongst others, a determining factor in Suit 676, had proven to be false or fraudulent based on new evidence discovered after the judgment; (iii) there was never any lineal connection between the late Madam Sam and YNS or his father, the defendant and his siblings. They were not entitled to any portion of the compensation or the said land belonging to Madam Sam; (iv) *res judicata* or estoppel did not apply in an action to impeach the High Court judgment for fraud under s. 44 of the Evidence Act 1950 ('EA'), an issue that was never canvassed and ventilated before the High Court in Suit 676 and at the Court of Appeal; (v) the plaintiff had made several attempts to verify the information with the Kwong Tong Cemetery before the trial of Suit 676 but received no cooperation from the management of the cemetery; (vi) in Suit 676, YNS told the presiding judge that Madam Tham, as inscribed in Chinese, was pronounced in Hakka as 'Madam Shum' which the judge accepted as the truth of the matter and granted the impugned High Court judgment. YNS was thereafter appointed as a co-administrator of the estate of the late Madam Sam; (vii) the plaintiff appealed to the Court of Appeal and motioned to the court to adduce new evidence over the discovery of another tombstone in YCF's name and tombstone in Madam Shum's name together with supporting records from Kwong Tong Cemetery but leave to adduce new evidence was denied by the Court of Appeal on the ground that the plaintiff was not diligent in securing the evidence at the trial of Suit 676. The Court of Appeal further opined that the new evidence would not have a determining factor effect on the outcome of the impugned High Court judgment. The defendant, in his defence and counterclaim, submitted that Suit 45 was filed as a tactical manoeuvre to delay Suit 805 where the defendant was seeking to remove the plaintiff as an administrator of the estate

of Madam Sam. According to the defendant, the plaintiff was attempting to deny the defendant and other lawful beneficiaries of their shares in the compensation sums of RM27,509,875.55, *ie*, the compensation sum awarded by the Land Administrator for the compulsory acquisition of the property belonging to the estate of Madam Sam.

Held (allowing application):

(1) The plaintiff had, on a balance of probabilities, discharged the burden to establish his claim against the defendant founded on s. 44 of the EA (for fraud or collusion in obtaining a judgment). The defendant failed to produce compelling or persuasive evidence to tilt the evidential scale in his favour in disputing this collateral action by the plaintiff. The circumstances of the case showed that YNS secured and produced false evidence in court while canvassing for his position in Suit 676. YNS's evidence, proven false or fictitious in the present proceeding, ultimately led to the granting of the impugned High Court judgment in Suit 676, the subject matter of impeachment in the present suit. (para 10)

(2) The plaintiff had used reasonable diligence in securing the fresh evidence in this suit as it was uncovered after the trial of Suit 676. The evidence on the fraudulent endeavour had an important or crucial influence on the result of this case. The evidence was credible enough to impeach the impugned High Court judgment that was contrary to the unsupported denial by the defendant. In those circumstances, there was no diligence requirement to produce evidence of fraud in this fresh suit as it was not a re-hearing of Suit 676. (para 11)

(3) A proven fraudulent or untruthful claim over supposed rights or interests in the estate of Madam Sam would not entitle or bestow YNS or his estate with such interest or rights. YNS came to court to plead his case with tainted hands. No court would allow a person to keep an advantage obtained by fraud. The court was careful not to find fraud unless it had specifically been pleaded and proved. Once proven, it vitiates judgments, contracts and all transactions. The burden shifted to the defendant to negate the plaintiff's fresh evidence on the fraudulent endeavour of YNS in Suit 676. There were no merits in the defendant's arguments. The defendant could not negate the new evidence of fraud committed by YNS upon the court in Suit 676 with compelling evidence. (paras 12 & 13)

(4) The following orders were hereby entered, *inter alia*, (i) it was ordered that the impugned High Court judgment that stood impeached be set aside immediately; (ii) the Registrar of the High Court was directed to remove the defendant from the grant letters of administration of the estate of the late Madam Sam as an administrator and/or beneficiary immediately, together with the names of any of his siblings and relatives

who were named as beneficiaries; (iii) an injunction was issued to permanently restrain YNS's siblings and/or the beneficiaries from acting or holding themselves out as the beneficiaries of the estate of Madam Sam; (iv) the estate of the defendant was directed to surrender and deliver to the plaintiff all materials and/or assets (if any) belonging to the estate of Madam Sam; and (v) the estate of the defendant was to refund all costs awarded and/or collected during the hearing in the High Court in Suit 676 and the Court of Appeal. (para 15)

Case(s) referred to:

Ang Game Hong & Anor v. Tee Kim Tiam & Ors [2018] CLJU 2008; [2018] 1 LNS 2008 CA ***(refd)***

Ang Game Hong & Anor v. Tee Kim Tiam & Ors [2020] 1 CLJ 141 FC ***(refd)***

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd [2001] 2 CLJ 321 CA ***(refd)***

Flower v. Lloyd [1878-79] 10 Ch D 327 ***(refd)***

Hock Hua Bank Bhd v. Sahari Murid [1980] CLJU 92; [1980] 1 LNS 92 FC ***(refd)***

Isaacs v. Robertson [1985] AC 97 ***(refd)***

Johara Bi Abdul Kadir Marican v. Lawrence Lam Kwok Fou & Anor [1980] CLJU 199; [1980] 1 LNS 199 FC ***(refd)***

K Ramalingam Krishnamoorthy & Ors v. Mohammad Razin Abdullah & Anor And Other Appeals [2017] CLJU 80; [2017] 1 LNS 80 CA ***(refd)***

Ladd v. Marshall [1954] 3 All ER 745 ***(refd)***

Lau Foo Sun v. Government Of Malaysia [1970] CLJU 56; [1970] 1 LNS 56 FC ***(refd)***

Lazarus Estates Ltd v. Beasley [1956] 1 All ER 341 ***(refd)***

Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***

Patch v. Ward [1867-68] LR 3 Ch App 203 ***(refd)***

Royal Bank Of Scotland Plc v. Highland Financial Partners LP & Ors [2013] EWCA Civ 328 ***(refd)***

Sabah Shell Petroleum Co Ltd & Anor v. The Owners Of And/Or Any Other Persons Interested In The Ship Or Vessel The 'Borcos Takdir' [2011] 9 CLJ 426 HC ***(refd)***

Seng Huat Hang Sdn Bhd v. Chee Seng & Co Sdn Bhd [1987] 1 MLJ 413 HC ***(refd)***

Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd [2013] 6 CLJ 673 FC ***(refd)***

Seruan Gemilang Makmur Sdn Bhd v. Kerajaan Negeri Pahang Darul Makmur & Anor [2016] 3 CLJ 1 FC ***(refd)***

Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd [2015] 7 CLJ 584 FC ***(refd)***

SP Chengalvaraya Naidu(d) v. Jagannath(d) 1994 AIR SC 853 ***(refd)***

Takhar v. Gracefield Developments Limited And Others [2019] 3 All ER 283 ***(refd)***

Tay Bok Choon v. Tahansan Sdn Bhd [1987] 1 CLJ 441; [1987] CLJ (Rep) 24 PC ***(refd)***

Tradewinds Properties Sdn Bhd v. Zulhkiple A Bakar & Ors [2019] 2 CLJ 261 CA ***(refd)***

Yow Man Kong v. Ghandirajan Arjunan & Anor [2023] 3 CLJ 503 CA ***(refd)***

Zung Zang Wood Products Sdn Bhd & Ors v. Kwan Chee Hang Sdn Bhd & Ors [2014] 2 CLJ 445 FC ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 44, 114(g)

Rules of Court 2012, O. 18 r. 19, O. 55 r. 7, O. 92

Rules of the Court of Appeal 1994, r. 7(3A)

Rules of the High Court 1980, O. 55 r. 5A

For the plaintiff - T Sudhar, Naren Gill & Ng Yee Lin; M/s Gill & Tang
For the defendant - Jason Chan, GK Ganesan & Lee Xin Yi; M/s S Mathews & Assocs
Glen Kenny Officer Of Amanah Raya Bhd

Reported by Lina E

JUDGMENT
(Encl. 1)

Hayatul Akmal Abdul Aziz J:

Introduction

[1] In a nutshell:

Impeachment Of A High Court Judgment

(i) on 21 January 2020, the plaintiff filed the present suit seeking to impeach a Kuala Lumpur High Court judgment dated 4 December 2017 in the Civil Suit No: 22NCVC-676-12-2015 (Suit 676, 2015), on the grounds of fraud. The crux of the dispute between the parties is the claim over who gets to control and share in the compensation sum of RM27,509,875.55 awarded by the Land Administrator for the compulsory acquisition of the property belonging to the estate of Madam Sam Poh San @ Shum Poh Sum, who holds ¾ undivided shares, while the balance ¼ undivided shares are held by another. The compensation sum is currently being held upon trust with Amanah Raya Berhad (D3: nominal defendant) named in the counterclaim by the defendant in the present suit.

The Backdrop (High Court 2015 To 2017)

(ii) Civil Suit No: 22NCVC-676-12-2015 (Suit 676, 2015):

(a) on 15 December 2015, one Yap Ngen Sang (YNS), as the plaintiff, sought a declaration against the defendants, (1) Yap Yoke Chong @ Allan Yap (D1) and (2) Leong Theam Fook and to revoke the letters of administration granted to D1 or YNS be added as a beneficiary.

(b) at that time, Yap Yoke Chong @ Allan Yap (the plaintiff in the present suit) had very much earlier, on 16 June 2013, been appointed as the administrator of the estate of the great-grandmother Madam Sam Poh San @ Shum Poh Sum in Kuala Lumpur High Court OS No: S-31NCVC-96-01-2013 (OS, 2013):

(Plaintiff's Core Bundle of Documents (PCBD) L.172, Tab 18, PDF pp. 150-152).

A (c) YNS asked for a declaration amongst others:

(a) That YNS is also beneficiary in the estate of Madam Sam Poh San @ Shum Poh Sum (the deceased), which included a ¾ undivided share in a landed property held under Geran No. 60391, Lot No. 1 Seksyen 10, Bandar Ampang, Daerah
B Hulu Langat, Selangor (the property).

(b) Alternatively, YNS should be joined and added as a personal representative and beneficiary in the Grant.

(c) That the Senior Assistant Registrar of the High Court is to take all necessary action to give effect to this order.

C (iii) on 4 December 2017, the Kuala Lumpur High Court found in favour of YNS and granted the judgment sought (the impugned HC judgment). The High Court found: (PCBD L.172 Tab1 PDF pp. 10 to 12 and Tab 2 PDF pp. 18 to 34):

D (a) The late Madam Sam Poh San @ Shum Poh Sum, was a registered proprietor of a ¾ undivided share in a landed property held under Geran No. 60391, Lot No. 1 Seksyen 10, Bandar Ampang, Daerah Hulu Langat, Selangor (the property), died intestate.

E (b) She was one of the wives of the late Yap Ah Shak, the 4th Kapitan Cina of Kuala Lumpur, who had succeeded the late Yap Ah Loy in 1885 until he died in 1889.

(c) On 11.03.2013, upon an application by Yap Yoke Chong @ Allan Yap, the KL HC declared that the late Madam Sam Poh San @ Shum Poh Sum is presumed to have passed on
F 13.06.1951 and, after that, secured the Letters of Administration dated 16.04.2013 over her estate. She was the great-grandmother of Yap Yoke Chong @ Allan Yap.

(d) When the late Madam Sam Poh San @ Shum Poh Sum passed:

G (i) She is survived by her only son, Yap Fatt Chew, who died on 20.12.1938, leaving behind his only son, Yap Phooi Fong.

(ii) Yap Phooi Fong is Yap Yoke Chong @ Allan Yap's father, who died intestate on 04.03.1990.

H (e) YNS, however, took the position that his father, Yap Hong, was the son of Yap Min Fook (the grandfather of YNS), who is supposedly one of the sons of the late Madam Sam Poh San @ Shum Poh Sum. Therefore, he claimed to have a beneficial interest in the estate of Madam Sam Poh San @ Shum Poh Sum. At the trial, to establish his claim, YNS relied on the following:

I (i) The information on the tombstone and the records kept by the Association of Kwong Tong Cemetery Management, Kuala Lumpur.

(ii) YNS oral evidence that his father brought him to his grandfather's cemetery during the Ching Beng Festival when he was young and supposedly informed him about the family land not far from where they live.

(f) Yap Yoke Chong @ Allan Yap took the position that:

(i) Yap Ah Shak had several wives and three sons:

- Yap Loong Hin, from the first wife,
- Yap Chin Fook, from the second wife, and
- Yap Fatt Yew, from Madam Sam Poh San @ Shum Poh Sum Shum Poh Sum, the fourth wife.

(ii) The following evidence at the trial established his lineage:

(a) A copy of a lease of the mining land showed that Yap Yoke Chong @ Allan Yap's father, Yap Phooi Fong, was the administrator of the late Madam Sam Poh San @ Shum Poh Sum's only surviving son, Yap Phooi Fong who died intestate on 4.3.1990.

(b) A birth Certificate showing that Yap Yoke Chong @ Allan Yap is the biological son of Yap Phooi Fong.

(c) The income tax return shows that Yap Yoke Chong @ Allan Yap was the assignee of the dividends payable to the estate of the late Yap Fatt Yew from the estate of Yap Ah Shek.

(d) The oral evidence of Yap Yoke Chong @ Allan Yap that his father, Yap Phooi Fong, used to collect rent from the tenants occupying the property; and

(e) Yap Yoke Chong @ Allan Yap was informed by Yap Chee Meow, the grandson of Yap Chin Fook, that his father, Yap Kit Fong, was the only son of Yap Chin Fook.

(g) The High Court determined that:

(i) YSN relied on two pieces of evidence to establish his claim on lineage:

(a) The tombstone:

- Of Madam Sam Poh San @ Shum Poh Sum at Kwong Tung Cemetery, Kuala Lumpur, which inscribed that the deceased was married into the Yap family. Son: Chin Fook, Fatt Yew, Daughter: Yap Tin. The date the tombstone was erected was 1950.
- The tombstone of the late Yap Chin Fook at the same location showed that his children were Yap Khun and Yap Hong, the father of YSN.

(b) The historical records and articles produced that:

- The records of the Association of Kwang Tung Cemetery, Kuala Lumpur, showed that Yap Chin Fook (1945: Plot 1547) and Madam Sam Poh San @ Shum Poh Sum (1937: Plot 23455) were interred there.
- The Court found convincing evidence that Madam Sam Poh San @ Shum Poh Sum died on 13.6.1951.
- The Court found the assertion of Yap Yoke Chong @ Allan Yap that the late Madam Sam Poh San @ Shum Poh Sum only had one son (Yap Fatt Yew), and Yap Chin Fook was the son of Yap Ah Shak's, another wife was untenable.
- There was no compelling reason to suspect that Yap Yoke Chong @ Allan Yap is the legitimate beneficiary of the estate of the late Madam Sam Poh San @ Shum Poh Sum

(ii) In the circumstances, the Court found that YSN had discharged his burden. Using s.34 of the Probate & Administration Act, 1953, to revoke or amend any Probate and Letters of Administration, the HC ordered the amendment of the LA to include YSN as a beneficiary in the estate of the late Madam Sam Poh San @ Shum Poh Sum, after declaring that YSN is a lawful beneficiary.

Court Of Appeal: (W-02(NCvC) (W)-2558-12-2017 (2558 2017 To 2018))

(iv) on 13 December 2017, aggrieved with that impugned HC order, (1) Yap Yoke Chong @ Allan Yap filed an appeal to the Court of Appeal (PCBD L.172, Tab 3, PDF pp. 36 to 37).

(v) on 19 October 2018, the Court of Appeal dismissed the appeal and affirmed the impugned HC judgment (PCBD L.172, Tab 4, PDF pp. 42 to 43). It rendered the impugned HC judgment final and binding between the parties in Suit 676, 2015, and held: (PCBD L.172 Tab 5, PDF pp. 45 to 59):

(a) It agreed with the findings of the High Court on the (1) tombstones and (2) the Record Book of the Association of Kwong Tung Cemetery to prove the lineal descendancy of YNS.

(b) The High Court did not err in its finding, in fact, or in law, to warrant appellate intervention.

(c) YNS and Yap Yoke Chong @ Allan Yap are lawful beneficiaries of the estate of Madam Sam Poh San @ Shum Poh Sum.

(d) They should be co-administrators of the deceased's estate.

(e) on the motion (L.15) by Yap Yoke Chong @ Allan Yap to adduce further evidence under s. 69(1) & (3) CJA 1964, and r. 7 Rules of the Court of Appeal 1994, by way of an affidavit which contains:

(i) The photographs of the tombstone erected for the late Madam Sam Poh San @ Shum Poh Sum, who died on 13 June 1951 and was interred at the Kwong Tong Cemetery, KL, together with copies of the Register Book of Records of the Association of Kwong Tong Cemetery Management KL and the receipt in respect of plot No. 21399, and the duly certified translation; and

(i) The photographs of the original tombstone erected in 1945 for Yap Chin Fook that was constructed by his sons, Yap Kit Fong and six other siblings, together with its duly certified translation in English. A copy of the Register Book of Records was previously marked as P12, and the receipt was therefore marked as P11 in the Appeal Record Part C, Vol 3(1).

Yap Yoke Chong @ Allan Yap argued that the motion was grounded on the assertion that the evidence was unavailable earlier. However, several attempts were made to secure it from the Association of Kwong Tong Cemetery Management before the trial at the HC. He claimed he was not able to read or write in Chinese, and it was practically impossible to search for the actual tombstone of his great-grandmother (the late Madam Sam Poh San @ Shum Poh Sum) at that cemetery that interned more than 250,000 bodies.

(f) The CA observed that at the trial before the HC, Yap Yoke Chong @ Allan Yap and his sister could not show a different tombstone belonging to the deceased great-grandmother when they were challenged to do so, only now to claim that they have found the grave and the correct tombstone of the deceased after the HC had rendered its judgment:

(i) The CA held that Yap Yoke Chong @ Allan Yap failed to exercise reasonable diligence to obtain the evidence before the trial at the HC.

(ii) Yap Yoke Chong @ Allan Yap could not provide convincing evidence that the deceased's tombstone could not have been obtained then.

(ii) The CA believed that the new evidence, if true, would not likely have a determining influence upon the decision of HC nor change its outcome.

The motion to introduce new evidence in L.15 was dismissed with cost.

(vi) On 19 July 2019, nine months after the Court of Appeal's determination, YNS passed away, leaving his estate and his contested entitlement in the estate of Madam Sam Poh San @ Shum Poh Sum under the administration of Yap Chee Siang (the defendant/son in the present suit) as the executor under the grant of probate issued by the High Court in OS No: WA-32NCVC-1572-08-2019.

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(vii) aggrieved with the outcome at the High Court and the Court of Appeal in Suit 676, 2015:

(a) on 21 January 2020, Yap Yoke Chong @ Allan Yap (the plaintiff herein) filed Suit 45, 2020.

(b) it was 15 months after the preceding Court of Appeal's determination to affirm the High Court decision in Suit 676, 2015.

(c) in Suit 45, 2020, it is to impeach the impugned HC judgment as being founded on fraud or false, forged, or fraudulent evidential materials tendered during the Suit 676, 2015 trial, as the plaintiff is procedurally and legally entitled to.

(d) the fraud was allegedly not discoverable at the trial of Suit 676, 2015.

(viii) the plaintiff based the foundation of his action on the principles followed in the Indian Supreme Court, in impeaching a judgment procured under fraudulent circumstances. In the case of *SP Chengalvaraya Naidu(d) v. Jagannath(d)* 1994 AIR SC 853; (1994) 1 SCC 1, the principles that can be distilled are:

(a) There is an overriding duty on the plaintiff to come to court with a genuine case, proven true, by compelling and truthful evidence.

(b) The concept of finality in litigation cannot be allowed to lead to absurdity, where the abuse of the judicial process is allowed to sustain fraud by dishonest parties.

(c) The court of law is about actual or true justice for the parties involved.

(d) The equitable maxim of coming to court with clean hands always applies in any given circumstances.

(e) A party who founded a claim premised on falsehood has no place before a court of law at any juncture of the legal proceedings.

(ix) the Court of Appeal's decision in *Ang Game Hong & Anor v. Tee Kim Tiam & Ors* [2018] CLJU 2008; [2018] 1 LNS 2008; [2018] 4 MLJ 432 is also cited, where the Court of Appeal in 2018 cited and followed the Federal Court in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393 that had observed:

(a) that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction.

(b) one exception to this is where the impugned final judgment of the High Court could be proved to be null and void on the grounds of illegality or lack of jurisdiction to bring an aggrieved party within the principle laid down in the Privy Council's case of *Isaacs v. Robertson* [1985] AC 97, where Lord Diplock:

(a) While rejecting the legal aspect of voidness and violability in the orders made by a court of unlimited jurisdiction, upheld the existence of a category of orders of the court in which an affected person by the order is entitled to have it set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court, without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity, and give the judge a discretion as to the order he will make.

(b) The privy Council emphasised that the courts have not closed the door as to the type of defects in the final judgment of the court that can be brought into the category that attracts *ex debito justitiae* the right to have it set aside without going into the appeal procedure, save that specifically it includes orders that have been obtained in breach of rules of natural justice.

The Present Suit 45, 2020: Salient Facts

[2] In the present suit (SoC) and in his reply to the (defence and counterclaim), the plaintiff claimed, amongst others: (IP L.67 PDF pp. 5 to 48, 99 to 129, 131 to 135):

(i) the foundation of:

(a) the proposed impeachment of the impugned HC judgment in Suit 676, 2015, granted in favour of the defendant on 4 December 2017, is that it was obtained under fraudulent circumstances.

(b) the plaintiff genuinely believes that the High Court had been fraudulently misled into granting the judgment by uncovering fraudulent materials after undergoing many difficulties that were not available at the time of the trial of Suit 676, 2015.

(c) it was not due to his lack of reasonable diligence.

A (d) the evidence by YNS on the tombstones purportedly of the late Madam Sam Poh San @ Shum Poh Sum and Yap Chin Fook that were, amongst others, a determining factor by the court in Suit 676, 2015, have proven to be false or fraudulent based on new evidence discovered after the 4 December 2017 judgment.

B (e) the plaintiff maintained that there was never any lineal connection between the late Madam Sam Poh San @ Shum Poh Sum and YNS or his father, the defendant, and his siblings. They are not entitled to any portion of the compensation or the said land belonging to Madam Shum.

C (f) save that the plaintiff did not appeal to the Federal Court over the decision of the Court of Appeal, the plaintiff elected to impeach the impugned HC judgment as it was uncovered that it was obtained under fraudulent circumstances. In the premise, *res judicata* or estoppel do not apply in an action to impeach the impugned HC D judgment for fraud under s. 44 of the Evidence Act 1950, an issue that was never canvassed and ventilated before the High Court in Suit 676, 2015 and at the Court of Appeal.

(ii) the plaintiff:

E (a) together with Yap Yoke Kuan @ Harvey Yap, Yap Lai Yoong @ Ah Lai @ Doris Yap (f) (deceased), and Mrs Jeyalingam Nee Myrna Yap Lai Kheng (f) are the beneficiaries of the estate Madam Sam Poh San @ Shum Poh Sum who died intestate on 13 June 1951, leaving behind her ¾ undivided share in the property to the F beneficiaries.

(b) his siblings, his father (Yap Phooi Foong), the plaintiff, and his great-grandmother, Madam Sam Poh San @ Shum Poh Sum, lived together at No. 53, Bukit Bintang Road, Kuala Lumpur.

G (c) the passing of Madam Sam Poh San @ Shum Poh Sum was recorded at the police station on p. 178798 of their register based on the report a day after her death on 14 June 1951 by one Liew Fook Kee.

(d) to obtain the letters of administration, the plaintiff had to get an order for the presumption of death that took place on 13 June 1951. H The plaintiff and his two other elder siblings were present at the funeral.

(iii) the plaintiff referred to the evidential materials produced by YNS in Suit 676, 2015, to point out the alleged fraud committed that had allegedly misled the court into granting the impugned HC judgment:

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(a) YNS claimed familial lineage (entirely denied by the plaintiff) to the late Madam Sam Poh San @ Shum Poh Sum by:

(a) Claiming that the late Madam Shum had another son named Yap Chin Fook, who died on 05.051945.

(b) Yap Chin Fook, with his wife, bore two sons, (i) Yap Hong (1908-11.12.1987) and (ii) Yap Khun, who had predeceased his elder brother.

(c) Yap Hong, with his wife Wong Thye, were the parents of YNS and his nine siblings.

(d) Yap Chin Fook died in 1945 and was interred at the Association of Kwong Tong Cemetery, Kuala Lumpur:

(i) YNS had adduced copies of the purported cemetery records for both the late Madam Sam Poh San @ Shum Poh Sum and Yap Chin Fook at the trial of Suit 676, 2015.

(ii) Photographs of the purported tombstones of both deceased as allegedly registered by the Kwong Tong Cemetery.

(iii) The Kwong Tong Cemetery was reserved for the Chinese, whose spoken dialect was Cantonese and Hakka.

(iv) YNS unsupported oral evidence that it was a family tradition for him and his father, Yap Hong, to pay the annual respects to their ancestors at the Tombstone of Yap Chin Fook and the late Madam Sam Poh San @ Shum Poh Sum

(v) Photographs of the alleged burial plots of the two deceased at the Kwong Tong cemetery were also produced.

(e) YNS used the photographs of the inscription of the tombstone of the two deceased to prove in Suit 676, 2015, that he was related to Yap Chin Fook, who was his grandfather and the late Madam Sam Poh San @ Shum Poh Sum as his great grandmother:

(i) The inscription on the tombstone of Yap Chin Fook purportedly said: *"It is engraved on the tombstone that Yap Chin Fook is our grandfather and the father of Yap Hong (YNS father) and Yap Khun, my father's younger brother. The tombstone was erected jointly by our family members in the early 2000s to replace the old one, which had gotten quite worn down over the years since he was buried in 1945."*

- A copy of the supposed Kwong Tong Cemetery Register page 390 for Tomb: 15457 was enclosed.

- A copy of the Kwong Tong Cemetery Register page showing the tombstone's location in the 4th row with receipt no. 409 followed by register number 15457 was enclosed.

A - it was alleged that Yap Chin Fook was also a son of the late Madam Sam Poh San @ Shum Poh Sum, together with Yap Fatt Yew. YNS testified that "Madam Shum was also buried near his grandfather's grave at the Kwong Tong Cemetery. On her tombstone are engraved the names of her children, Yap Chin Fook, Yap Fatt Yew, and Yap Tin.

B

(ii) YNS produced photographs of tombstone No. 23455 that reads as "Yap Madam Tham":

- Three copies of the supposed Register page from Kwong Tong Cemetery for receipt no. 5943 with the registration number 23455 were enclosed.

C

- Based on the inscription on the tombstone, Madam Tham died in 1950.

- Mr Wei Gin Hong, the admin manager of Kwong Tong Cemetery, stated that based on their records, 23455 "Yap Madam Tham" was buried in 1937, not 1950.

D

(emphasis added)

(b) the plaintiff made several attempts to verify the information with Kwong Tong Cemetery before the trial of Suit 676, 2015 but received no cooperation from the management of the cemetery. The issue of searching for the graves is worsen by the fact that the plaintiff is not literate in Chinese.

E

(c) in Suit 676, 2015, YNS told the presiding judge that Madam Tham, as inscribed in Chinese, is pronounced in Hakka as Madam Shum, which the learned judge accepted as the truth of the matter and granted the impugned HC judgment. YNS was thereafter appointed a co-administrator of the estate of the late Madam Sam Poh San @ Shum Poh Sum.

F

(d) the plaintiff appealed to the Court of Appeal and motioned to the court to adduce new evidence over the discovery of another tombstone in Yap Chin Fook's name and a tombstone in Madam Shum's name together with supporting records from Kwong Tong Cemetery, but leave to adduce new evidence was denied by the Court of Appeal on the grounds that the plaintiff was not diligent in securing the evidence at the trial of Suit 676, 2015. The Court of Appeal further opined that the new evidence would not have a determining effect on the outcome of the impugned HC judgment.

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(iv) particulars of the fraudulent endeavour committed by YNS that had misled the court in granting the impugned HC judgment (s. 44 of the Evidence Act 1950). Since the dismissal of the appeal by the Court of Appeal, the plaintiff's diligent inquiries yielded the following:

I

(a) YNS and/or through his agents or his servants deliberately, intentionally, and fraudulently:

(a) A tombstone was fabricated to impersonate the grave of the late Madam Tham from the Yap family.

(b) They falsely inscribed on the said tombstone false statements that her sons were Yap Chin Fook and Yap Fatt Yew, together with her daughter Yap Tin.

(c) The deliberate fraud was to deceive the Court into believing that Madam Tham from the Yap family was, in fact, the late Madam Sam Poh San @ Shum Poh Sum.

(d) Convincingly misleading the Court to believe that Madam Tham in Chinese character is pronounced Shum in Hakka, causing the presiding judge to hold that it must be the same person as she was one of Yap Ah Shak's wives.

(e) The impugned HC Judgment had been obtained by fraud.

(b) Kwong Tong Cemetery records show that:

(a) Burial Plot No. 23455 was issued for Madam Tham from the Yap family, who died in 1937 and was relied on by YNS in Suit 676, 2015.

(b) However, this is not the actual tombstone for Madam Tham, located at Plot 23455; neither was it the actual tombstone for Madam Shum, situated at Plot 21399.

(c) The purported tombstone is not located at Plot 23455 but elsewhere within the Cemetery compound.

(d) The fabricated inscription on the tombstone by YNS does not match the actual inscription on the genuine tombstone at Plot 23455.

(e) YNS fraudulently deceived and misled the Court.

(f) **Kwong Tong Cemetery, *via* its solicitor's letter dated 15.3.2019, confirmed the following:**

- Plot 23455 is registered to Tam(f) of the Yap family, who died in 1937 at 50.
- Plot 23455 is at GPS coordinates Latitude: 3.07.11.73661 and Longitude: 101.41.37.16026 within the cemetery compound.
- The two photographs of the purported tombstone produced by YNS as the tombstone for Plot 23455 do not show the burial plot or tombstone located at Plot 23455.
- The location of the purported tombstone in YNS photographs has been located at a different site with the GPS coordinates Latitude: 3.07.11.74598 and Longitude 101.41.37.51759 within the cemetery compound.

A - Kwong Tong Cemetery had no records of YNS's purported tombstone, and they have never given any permission to anyone to renovate, replace or move the tombstone at Plot 23455.

(g) YNS intentionally misled the Court into believing the word Tham to mean Shum in Hakka. The written Chinese character for Tham is entirely different from the name Shum, and likewise, the pronouncement of the characters in the Hakka dialect is different.

(h) In light of the above, YNS and his father never paid the annual respects (Ching Ming) to Madam Shum or Madam Tham at their respective tombstones at Plot 2139 or Plot 23455 since they were buried at different locations within the compound of the cemetery, contrary to the location provided by YNS at the trial in Suit 676,2015.

(i) Since the actual tombstones of Madam Shum and Madam Tham are located at different locations within the cemetery compound, it was YNS or his agents or servants who were responsible for the construction of the fabricated tombstone before the trial of Suit 676, 2015.

(j) The Kwong Tong Cemetery record also shows:

- That the late Madam Sam Poh San @ Shum Poh Sum was registered at Plot 21399 with the inscription 13.6.1951 as the date of death on the tombstone, and she was the wife of Kapitan Yap Ah Shak.

- Receipt No.1328 on 15.6.1951 for the special burial plot No. 21399 for Madam Sam Poh San @ Shum Poh Sum, confirming that she passed away at Jalan Bukit Bintang, Kuala Lumpur.

- Her tombstone is at GPS coordinates Latitude: 3.07.12.24542 and Longitude: 101.41.44.72409.

- Her tombstone does not resemble the fabricated version by YNS to draw a linkage to her.

(c) the Kwong Tong Cemetery record also shows:

(a) That a burial Plot No. 15457 was issued to Yap Chin Fook, who died in 1945 at 64 years old.

(b) YNS, at the trial in Suit 676, 2015, produced photographs of a dummy tombstone with a false inscription to trace his supposed lineage to Yap Chin Fook.

(c) It is not the actual tombstone of Yap Chin Fook located at Plot 15457 but located elsewhere within the compound of the cemetery.

(d) The inscription on the actual tombstone of Yap Chin Fook does not match the inscription produced by YNS at the trial. YNS admitted at the trial that he and his siblings had been responsible for the inscription, which is now proven false. YNS had misled the Court into believing the photographs represented the actual tombstone of Yap Chin Fook when it was not.

(e) **Kwong Tong Cemetery, *via* its solicitor's letter dated 15.03.2019, confirmed the following:**

- Plot 15457 is registered to Yap Chin Fook, who was 64 years old when he died in 1945.
- Plot 15457 is at GPS coordinates Latitude: 3.07.20.80933 and Longitude: 101.41.46.09700 within the cemetery compound.
- The two photographs of the purported tombstone produced by YNS as the tombstone for Plot 15457 do not show the burial plot or tombstone located at Plot 15457.
- The location of the purported tombstone in YNS photographs has been located at a different site with the GPS coordinates Latitude: 3.07.11.92748 and Longitude 101.41.39.05131 within the cemetery compound.
- Kwong Tong Cemetery had no records of YNS's purported tombstone, and they have never given any permission to anyone to renovate, replace or move the tombstone at Plot 15457.

(f) YNS admitted during the trial in Suit 676, 2015, that it was he and his siblings that were responsible for constructing the tombstone of Yap Chin Fook (fabricated) to replace the original tombstone at Plot 15457.

(g) YNS falsely and fraudulently represented that the dummy tombstone was the actual tombstone of Yap Chin Fook when in fact, it was never the original tombstone on Plot 15457 that had misled the Court at the trial.

(h) In light of the above, YNS and his father never paid the annual respects to Yap Chin Fook since he was buried at different locations within the compound of the cemetery, contrary to the location provided by YNS at the trial in Suit 676, 2015.

(i) Since the actual tombstones of Yap Chin Fook are located at a different location within the cemetery compound, it was YNS or his agents or servants who were responsible for the construction of the fabricated tombstone before the trial of Suit 676, 2015.

A

(j) The name Kit Fong inscribed on the tombstone at Plot 15457 was the name of the father of Simon Yap Chee Meow, who gave evidence during the Suit 676, 2015 trial where he confirmed that his father's name was Yap Kit Fong, the son of Yap Chin Fook and grandson of Yap Ah Shak.

(emphasis added)

B

(v) the fraudulent endeavour by YNS deceived the court in Suit 676, 2015, to make a finding:

> *Having considered the oral testimony of the plaintiff (YNS), PW3 and supported by documentary evidence of the inscriptions on the tombstone of Shum Poh Sum and Yap Chin Fook, as well as the records of the Kwong Tung Association, I find that the plaintiff has proved that he is the beneficiary of Shum Poh Sum.*
>
> (emphasis added)

C

It allowed YNS to be appointed as a co-administrator of the estate of Madam Sam Poh San @ Shum Poh Sum, to which he was never legally entitled.

D

(vi) in denying the defendant's counterclaim, the plaintiff argued:

(a) it is trite law that the procedure to impeach a judgment obtained under fraudulent circumstances is to attack the impugned HC judgment collaterally through a separate suit filed for that purpose.

E

(b) consent by parties cannot vitiate or condone fraud committed in a court proceeding.

(c) uncovered evidence shows that YNS intentionally and fraudulently fabricated evidence at the trial of Suit 676, 2015, that deceived the court in granting the impugned HC judgment. The fraudulent endeavour by YNS was to take a share in the estate of the late Madam Sam Poh San @ Shum Poh Sum when he was never entitled. In the circumstances, the plaintiff prayed that the reliefs prayed for by the defendant in his defence and counterclaim be dismissed with costs.

F

G

(vii) the plaintiff prayed (in brief):

(a) that the impugned HC judgment be set aside.

H

(b) the Registrar of the High Court be directed to remove the defendant from the grant letters of administration of the estate of the late Madam Sam Poh San @ Shum Poh Sum as an administrator and or beneficiary immediately together with the names of any of his siblings and relatives who thereafter became named as beneficiaries because of YNS deceit and fraud.

I

(c) an injunction to restrain the YNS siblings and or the beneficiaries from acting or holding themselves out as the estate's beneficiaries of the late Madam Sam Poh San @ Shum Poh Sum.

(d) the defendant be directed to deliver up all assets (if any) belonging to the estate of Madam Sam Poh San @ Shum Poh Sum.

(e) the defendant is to refund all costs awarded and or collected by the defendant regarding the hearing in the High Court and the Court of Appeal.

(f) costs.

[3] The defendant in his defence and counterclaim, claimed:

(i) this present suit was filed as a tactical manoeuvre to delay Civil Suit WA-22NCVC-805-10-2019 (Suit 805):

(a) the defendant is seeking to remove the plaintiff as an administrator of the estate of Madam Sam Poh San @ Shum Poh Sum.

(b) the plaintiff is attempting to deny the defendant and other lawful beneficiaries their share in the compensation sums of RM27,509,875.55 (the compensation sum) awarded by the Land Administrator for the compulsory acquisition of the property.

(ii) the plaintiff elected not to appeal the decision of the Court of Appeal in Suit 676, 2015, to the Federal Court. All issues raised at the High Court and Court of Appeal are now subject to issue estoppel.

(iii) Suit 676, 2015, had proven that YNS is a lawful beneficiary of the estate of Madam Sam Poh San @ Shum Poh Sum and was affirmed by the Court of Appeal:

(a) in applying for the letter of administration, the plaintiff claimed to be the sole beneficiary, which was proven untrue.

(b) no death certificate of Madam Sam Poh San @ Shum Poh Sum was produced, save for a declaration that she died on 13 June 1951 (KL HC OS No. 25NCVC-7-02-2013). There is no compelling evidence tendered at the trial of Suit 676, 2015, of the actual date of passing of Madam Sam Poh San @ Shum Poh Sum.

(c) the plaintiff had also applied for and obtained the letters of administration for the other ¼ undivided share in the property held by Choo Lin Cheong (f) (deceased), claiming that she was his grandmother:

(a) But his dishonest effort was thwarted by the intervention of YNS and Leong Theam Fook, which resulted in a consent order dated 8 August 2017 and judgment.

(b) The said LA was revoked.

A (d) there is no evidence that Yap Fatt Yew was the son/issue of Madam Sam Poh San @ Shum Poh Sum. All that was established at the trial of Suit 676, 2015, was that he was the son of Kapitan Yap Ah Shak.

(e) the findings and judgment of the High Court in Suit 676, 2015 are final and binding on the parties after the Court of Appeal affirmed
B the decision with there being no appeal to the Federal Court:

(a) The issue of the alleged discovery of the grave of Madam Sam Poh San @ Shum Poh Sum and Yap Chin Fook was already raised and considered by the Court of Appeal.

C (b) The motion for leave (Rule 7(3A), Rules of the Court of Appeal) by the plaintiff to adduce fresh evidence was denied as the plaintiff herein failed to prove that he had exercised reasonable diligence to obtain that evidence before the trial of Suit 676, 2015. The new evidence would not have a determining influence on the impugned HC decision.

D (iv) the allegations of fraud and false evidence pleaded by the plaintiff are nothing new. This suit was only taken as an afterthought after he discovered YNS's death on 19 July 2019. The plaintiff seeks an attempt to reverse the decision in Suit 676, 2015. The plaintiff must be estopped from taking a second bite at the decision affirmed by the Court of
E Appeal:

(a) it has been proven at the trial of Suit 676, 2015, that Yap Chin Fook is the grandfather of YNS.

(b) the plaintiff could not identify the location of the tombstone of Yap
F Chin Fook at the trial. The photographic evidence produced by YNS confirmed the tombstone of Yap Chin Fook, corroborated by the admin manager of Kwong Tong Cemetery Association.

(v) the defendant maintained that the tombstone of Madam Sam Poh San @ Shum Poh Sum was identified at Plot 23455, based on the inscription
G on the tombstone and the cemetery records. The location of this tombstone was already raised at the trial of Suit 676, 2015. The defendant vehemently denies any forgery or fabrication of the tombstone adduced by YNS at the trial. This action by the plaintiff is an abuse of process. There must be finality in litigation.

H (vi) it was argued that even if (which is denied) the tombstones uncovered by the plaintiff are proven true, it does not mean that YNS is not the lawful beneficiary of the estate of Madam Sam Poh San @ Shum Poh Sum. In the circumstances, the plaintiff asks that the claim by the plaintiff be dismissed with costs.

I (vii) in his counterclaim, the defendant claimed that:

(a) the defendant is the lawful executor of the estate of YNS (his father), who was the co-administrator and beneficiary of the estate of Madam Sam Poh San @ Shum Poh Sum.

(b) the second defendant is the Pendaftar Hakmilik Tanah Negeri Selangor, named in this counterclaim as a nominal defendant pending the determination of the status of the estate of Madam Sam Poh San @ Shum Poh Sum concerning the impugned property.

(c) the third defendant is Amanah Raya Berhad, who is entrusted to hold the compensation sum awarded for the compulsory acquisition of the property as the trustee and is named as a nominal defendant pending the determination of the estate of Madam Sam Poh San @ Shum Poh Sum.

(d) the defendant claimed that the plaintiff had filed the present suit in bad faith to deny the defendant and other lawful beneficiaries their right to the estate of Madam Sam Poh San @ Shum Poh Sum. Consequently, the defendant has suffered loss and damage and prays for relief, as prayed in the defence and counterclaim.

Witnesses

[4] The parties called:

(i) plaintiff:

(a) PW1: Muhammad Faisal bin A Razak:
land office.

(b) PW2: Wey Jiun Horng:
subpoena witness, Administration Manager, Kwong Tong Cemetery Management.

(c) PW3: Chee Wai Lun:
subpoena witness, Lawyer-Messrs Keppy Wong & Associates.

(d) PW4: Yap Chee Sun: L111:
land survey technician.

(e) PW5: Lau Hor Seng: L125:
contractor, Thiam Leong Graveyard Landscape.

(f) PW6: Rashidah binti Md Rashid:
subpoena witness, Jabatan Pendaftaran Negara.

(g) PW7: Yap Yoke Chong @ Allan Yap: L109:
retiree, the plaintiff.

(ii) defendant:

(h) DW1: Yap Chee Siang: L135:
businessman, YNS's son, the defendant.

A **The Parties Arguments**

[5] I have observed and considered the parties' arguments in canvassing and ventilating their positions. In a nutshell, as follows:

The Plaintiff

B **[6]** The plaintiff argued as follows:

(i) at the trial of Suit 676, 2015, YNS had fraudulently produced false evidential materials to deceptively establish his lineal linkage to the late Madam Sam Poh San @ Shum Poh Sum, claiming:

C (a) allegedly, Madam Shum's eldest son, Yap Chin Fook (who died in 1945), was his grandfather (when it is not true).

(b) that Yap Chin Fook eldest son, Yap Hong (1908 to 1987), was his biological father (when it is not true), so he could claim a share as a beneficiary in Madam Sam Poh San @ Shum Poh
D Sum's estate (compensation sum).

(c) he misled the court by adducing photographs of fabricated tombstones with falsified inscriptions allegedly belonging to:

(1) Madam Tham, the false inscriptions read (CBOD L.90 Part
E B vol. 2 PDF pp. 164 to 166):

> Burial Plot 23455, Sons: Chin Fook, Fatt Yew, and daughter Yap Tin. YNS falsely claimed at the trial that Tham in Hakka is Shum.

(2) Yap Chin Fook, the false inscriptions read (CBOD, L.90,
F Part B vol. 2, pp. 158 to 160):

> Burial Plot 15457, Sons Yap Hong, and Yap Khun.

(ii) the plaintiff asserted that all along, Madam Sam Poh San @ Shum Poh Sum had only one son, Yap Fatt Yew (died 20 December 1938):

G (a) Yap Fatt Yew only had one son, Yap Phooi Fong, who was the estate administrator of Yap Fatt Yew.

(b) Yap Phooi Fong (died April 1990) was the biological father of the plaintiff (CBOD, L.92, Part B vol. 4, PDF pp. 183 to 185).

H (iii) the deceptive evidence by YNS in Suit 676, 2015, resulted in the 4 December 2017 judgment in his favour, and the Court of Appeal *vide* Appeal 2558 dismissed the plaintiff's appeal and affirmed the impugned HC judgment.

I (iv) after the impugned HC judgment, the plaintiff uncovered the first batch of fresh evidence of the fraudulent endeavour of YNS to deceive the court. The plaintiff attempted to introduce this first batch of fresh evidence by a motion for leave to the Court of Appeal in Appeal 2558

but was denied. The Court of Appeal held that the plaintiff was not diligent enough to produce it at the trial of Suit 676, 2015 and that the first batch of fresh evidence would not determine the suit's outcome. The first batch of new evidence to establish fraud by YNS were:

(a) Photographs of Madam Sam Poh San @ Shum Poh Sum genuine tombstones at Burial Plot No. 21399, refuting the evidence of YNS in Suit 676, 2015 (L.172 PCBD Tab 25 PDF pp. 188-192).

(b) Photographs of Yap Chin Fook genuine tombstones at Burial Plot No.15457, refuting the evidence of YNS in Suit 676, 2015 ((L.172 PCBD Tab 26 PDF pp. 193-199).

(c) Kwong Tong Cemetery records for the genuine Madam Sam Poh San @ Shum Poh Sum tombstone that shows its location at Burial Plot No.21399, refuting the evidence of YNS in Suit 676, 2015 (PCBD, L..172 Tab 7 PDF pp. 63-97).

(v) after Appeal 2558 was dismissed, the plaintiff continued to uncover new evidence that established YNS's fraud upon the court:

(a) Photographs of Madam Tham's genuine tombstone at Burial Plot No. 23455: (L.172 PCBD Tab 27 PDF pp. 200-203), further refuting YNS's claim.

(b) Kwong Tong Cemetery "buku mayat" in respect of Madam Tham: PBOD, L.141, Vol. 9, PDF pp. 31-32 (L.172 Tab 7 PCBD) also refuting YNS's claim.

(c) Kwong Tong Cemetery Receipt No.409 in respect Yap Chin Fook: POBD, L.141, Vol. 9, PDF pp. 15-16 (L.172 Tab 7, PCBD) also refuting YNS's claim.

(d) Kwong Tong Cemetery solicitor's letter (15.03.2019: PBOD, L.141, Vol. 9, pp. 6-39 (Tab 7, PCBD) that clarified:

(i) Madam Sam Poh San @ Shum Poh Sum died at home at eighty-two on 15.06.1951, as claimed by the plaintiff.

(ii) Madam Tham, whose Burial Plot No. 23455 belongs to Madam Tham of one Yap family who died at fifty in 1937.

(iii) The photographs of Madam Tham's dummy tombstone adduced by YNS in Suit 676, 2015, were not photographs of Burial Plot No. 23455.

(iv) Kwong Tong Cemetery has no records of Madam Tham's dummy tombstone.

(v) Madam Tham's dummy tombstone was erected without approval from Kwong Tong Cemetery.

(vi) Yap Chin Fook's genuine tombstone is at Burial Plot No. 15457, who died at age sixty-four at Hospital Tung Shin on 05.05.1945.

A

(vii) The photographs of Yap Chin Fook's dummy tombstone adduced by YNS in Suit 676, 2015, were not photographs of the genuine Burial Plot No. 15457 or its location.

(viii) Kwong Tong Cemetery has no record of Yap Chin Fook's dummy tombstone.

B

(ix) Yap Chin Fook's dummy tombstone was erected with permission from Kwong Tong Cemetery.

(vi) the plaintiff also engaged the services of PW4 of perunding ukur KSN to carry out a GPS survey (L.150, PDF p. 5 (L.172 Tab 8, PCBD) and mapping of the tombstones in dispute, to appropriately point the location of the impugned tombstones and prove the falsity of the claim by YNS.

C

(vii) contrary to YNS's claim that:

(a) Yap Chin Fook is his father's (Yap Hong) father, PW6 a subpoena witness and an officer from the Jabatan Pendaftaran Negara's testified the record (Yap Hong's identity card application on 1 November 1960) that was produced on 28 September 2021 after a subpoena issued, showed that his father's (Yap Hong) father was, in fact, Yap Hing (L.150, PDF pp. 366 to 372 (L.172 Tab 12, PCBD); L.53, pp. 21 to 22, paras. 8.2-8.4 (L.172 Tab 29 PCBD), and not Yap Chin Fook as falsely claimed.

D

E

(b) YNS swore and affirmed that the information that his father was Yap Hing, and among other things he provided to JPN is true on 1 November 1960. His thumbprint was affixed (L.172 PDF p. 117 (L.172 Tab 12 PCBD), at the bottom of the page.

F

(c) similar information can also be seen on (L.172 PDF p. 119 (L.172 Tab 12 PCBD).

(d) the preceding evidence and the new evidence in paras. 6.4 and 6.5 hereof collectively are clear evidence that completely refute and negate YNS's claim of familial lineage with Madam Sam Poh San @ Shum Poh Sum as his great-grandmother in Suit 676, 2015.

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H

(e) YNS had consciously and with deliberate dishonesty committed the fraud upon the court in his evidence in Suit 676, 2015: *Royal Bank Of Scotland Plc v. Highland Financial Partners LP & Ors* [2013] EWCA Civ 328.

(viii) on 12 October 2020:

I

(a) the defendant applied under L.24 to strike out the present suit under O. 18 r. 19 and O. 92 of the ROC 2012, on the grounds of *res judicata.*

(b) the High Court allowed it on 24 May 2021 in L.45.

(c) the plaintiff appealed to the Court of Appeal (L.42, (W-01) IM) (NCvC-306-06-2021 (Appeal 306) ((L.172 Tab 31, PCBD)).

(d) on 23 August 2022, the Court of Appeal unanimously allowed Appeal 306 and held that there is no issue of *res judicata* as fraud was not an issue in 2015 suit (Suit 676, 2015) and remitted the present suit back to the HC for trial.

(e) the defendant's motion for leave to appeal to the Federal Court was dismissed on 23 April 2022.

(ix) the defendant:

(a) has no defence and could not negate nor refute the evidence of fraud committed by his father (YNS) by merely arguing that:

(a) This present suit was filed as a tactical manoeuvre to delay Civil Suit WA-22NCVC-805-10/2019 (Suit 805) that he filed to remove the plaintiff as an administrator of the estate of Madam Sam Poh San @ Shum Poh Sum.

(b) The plaintiff is attempting to deny the defendant and other lawful beneficiaries their share in the compensation sums of RM27,509,875.55 (the compensation sum) awarded by the Land Administrator for the compulsory acquisition of the property.

(c) The plaintiff elected not to appeal the decision of the Court of Appeal in Suit 676, 2015, to the Federal Court. The HC decision is now final and binding between the parties.

(d) All issues raised at the High Court and Court of Appeal are now subject to issue estoppel.

(e) Suit 676, 2015, had proven that YNS is a lawful beneficiary of the estate of Madam Sam Poh San @ Shum Poh Sum and was affirmed by the Court of Appeal.

(f) No death certificate of Madam Sam Poh San @ Shum Poh Sum was produced, save for a declaration that she died on 13.06.1951 (KL HC OS No. 25NCVC-7-880 02/2013). There is no compelling evidence tendered at the trial of Suit 676, 2015, of the actual date of passing of Madam Shum Poh Sum.

(g) The plaintiff had also applied for and obtained the Letters of Administration for the other ¼ undivided share in the property held by Choo Lin Cheong (f) (deceased), claiming that she was his grandmother. But his dishonest effort was thwarted by the intervention of YNS and Leong Theam Fook.

A

(h) There is no evidence that Yap Fatt Yew was the son/issue of Madam Sam Poh San @ Shum Poh Sum. All that was established at the trial of Suit 676, 2015, was that he was the son of Kapitan Yap Ah Shak.

(i) The issue of the alleged discovery of the grave of Madam Sam Poh San @ Shum Poh Sum and Yap Chin Fook was already raised and considered by the Court of Appeal.

B

(j) The motion for leave (Rule 7(3A), Rules of the Court of Appeal) by the plaintiff to adduce fresh evidence was denied as the plaintiff herein failed to prove that he had exercised reasonable diligence to obtain that evidence before the trial of Suit 676, 2015. The new evidence would not have a determining influence on the impugned HC decision.

C

(k) The allegations of fraud and false evidence pleaded by the plaintiff are nothing new. This suit was only taken as an afterthought after he discovered YNS's death on 19.07.2019.

D

(l) It has been proven at the trial of Suit 676, 2015, that Yap Chin Fook is the grandfather of YNS.

(m) The defendant maintained that the tombstone of Madam Sam Poh San @ Shum Poh Sum was identified at Plot 23455, based on the inscription on the tombstone and the cemetery records.

E

(n) The defendant vehemently denies any forgery or fabrication of the tombstone adduced by YNS at the trial.

(o) **In his counterclaim, the defendant** claimed that fundamentally, the plaintiff had filed the present suit in bad faith to deny the defendant and other lawful beneficiaries their right to the estate of Madam Sam Poh San @ Shum Poh Sum. (emphasis added)

F

(b) during cross-examination of his testimony, DW1/defendant:

G

(a) Admitted he is unfamiliar with the documents filed in this suit (L.164 NOP, PDF pg. 989, lines 22-24).

(b) Admitted that he does not know PW2, Wey Jiun Horng, the Administration Manager of Kwong Tong Cemetery Management (L.164 NOP, PDF pg. 992, lines 5-14).

H

(c) He has no knowledge of his ancestry beyond Yap Hong. He admitted he did not know Yap Fatt Yew or Yap Phooi Fong. He only got to know of the name of Madam Sam Poh San @ Shum Poh Sum in the present suit (L.164 NOP PDF, p. 995 line 33 to p. 996 line 5; p. 996 line 36; p. 997 line 21; p. 1001 lines 7-19).

I

(d) The evidence in his Amended Witness Statement, L.135, was information supplied by the solicitors. Admittedly, he has no personal knowledge of the evidence in his Amended Witness Statement and to my mind has no evidential value.

(c) throughout the proceedings, the defendant failed to call witnesses with personal knowledge to support the defence. The plaintiff proposed that an adverse inference be made against the defendant for that failure: *Sabah Shell Petroleum Co Ltd & Anor v. The Owners Of And/Or Any Other Persons Interested In The Ship Or Vessel The 'Borcos Takdir'* [2011] 9 CLJ 426; [2012] 5 MLJ 515, where an adverse inference under s. 114(g) of the Evidence Act 1950 was made.

(d) the defendant, in his counterclaim:

(a) Pleaded that the estate of Madam Sam Poh San @ Shum Poh Sum is *Bona Vacantia* since there is no record that Yap Fatt Yew, the grandfather of the plaintiff, was a son of Madam Shum, adduced at the trial, and therefore the LA secured by the plaintiff is null.

(b) This argument is a non-starter since YNS had no familial linkage with Madam Sam Poh San @ Shum Poh Sum and, in the circumstances, is a mere busybody lacking legal standing: *Ikatan Kelab-Kelab Melayu negeri Pulau Pinang (499-Penang) (suing through its President, Dato' Seri Hj Mohd Yussof Latif) & Ors v. Yayasan Bumiputra Pulau Pinang & Ors and another Appeal* [2014] 1 MLJ 27, FC.

(c) In any event, YNS, during the 676, 2015 trial, admitted that Madam Sam Poh San @ Shum Poh Sum was Yap Fatt Yew's mother.

(x) in the circumstances, the plaintiff submits that YNS's fraud fundamentally impairs the impugned HC judgment. As a matter of right, it must be impeached and set aside as prayed with costs.

The Defendant

[7] The defendant argued as follows:

(i) firstly, in my observation:

(a) I take cognisance (as rightly pointed out by the plaintiff's counsel) that in his evidence during cross-examination, the defendant, under oath, admitted that he had no personal knowledge of the matters about the issue in the present suit and mostly the contents of his amended witness statement are inputs from his counsel, as I had observed earlier in the trial.

A (b) that said, it would be appropriate to hold that the defendant's submissions below are evidently outside his knowledge and with no direct evidence to support it. In the circumstances, I agree with the plaintiff's arguments that the defendant's counsel now offers evidence from the Bar that cannot be tolerated.

B (c) the Court of Appeal clarified the position in *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609; [1995] 1 MLJ 281, condemning such practices.

In the circumstances, I attach little weight to the defendant's arguments as unsupported and without evidence of the defendant under oath. But for completeness, I will continue to further observe that:

C

(ii) in contesting the plaintiff's action, the counsel for the defendant:

D (a) argued that the plaintiff failed to meet the high evidential threshold (without compellingly showing what it is) to establish the alleged fraud by YNS in Suit 676, 2015: *Seruan Gemilang Makmur Sdn Bhd v. Kerajaan Pahang Darul Makmur & Anor* [2016] 3 CLJ 1.

E (a) If at all, YNS is personally responsible.

(b) But not his family members or servants who were not named and joined as parties when they are also the beneficiaries in the estate of Madam Sam Poh San @ Shum Poh Sum by the impugned HC Judgment.

F (b) after considering the arguments of the defendant and the plaintiff, I see no merit in the defendant's unsupported arguments. The plaintiff and YNS were parties concerning the impugned HC judgment, not the rest.

G (c) the attempted arguments on the position of fraud are a non-starter, as the legal position on actual fraud in impeachment proceedings is settled, as seen in para. [8] below.

H (d) the civil burden in fraud cases has always been on a balance of probabilities and has not been altered to a "higher" burden. In *Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd* [2015] 7 CLJ 584, the Federal Court has made a significant clarification on the law. The standard of proof of fraud in a civil claim is based on a balance of probabilities. In the present suit therefore, any unsupported suggestion otherwise would be untenable and go against the trite legal position.

I

(e) I am unconvinced with the defendant's argument on the basis that it had not prevented the plaintiff from placing his case before the court, citing *Seruan Gemilang Makmur Sdn Bhd v. Kerajaan Pahang Darul Makmur & Anor* [2016] 3 CLJ 1. The Federal Court observed that, once proven at trial, intrinsic fraud (including perjured evidence) constitutes appropriate ground to impeach a judgment under s. 44 of the EA 1950. In the circumstances of the present case, I find this technical argument is without merit and one cannot explain the fraud committed by YNS on pure technicalities.

(f) the fact remains that the defendant has failed to appropriately address and directly negate the actual fraud uncovered by the plaintiff in paras. 6(iii), 6(iv), 6(v), and 6(vi), which are not mere suspicions nor conjectures (as claimed by the defendant). Merely making an unsupported argument that they are erroneous evidence does not negate the plaintiff's new evidence on fraud. There is no evidence to support that unfounded argument.

(g) those facts remained unrefuted, which would justify impeachment of the impugned HC judgment as there is no answer or rebuttal by the defendant save for bare technical arguments.

(h) I have perused the High Court and the Court of Appeal records. Fraud was never an issue to be canvassed and ventilated then. To suggest it was, borders on misleading the court in the present suit.

(i) I am not with the defendant on his suggestion that the filing of the present suit coincided with the death of YNS and is, therefore, a tactical manoeuvre whereby YNS will no longer be around to answer the allegations of fraud. I believe it simply is an untenable proposition based on the facts of the present case. It does not adversely impact the present proceedings. The defendant must offer a credible, and verifiable defence once the burden shifts from the plaintiff to the defendant.

(iii) the defendant also argued that to succeed, the plaintiff must prove that he could not have discovered the alleged fraud by exercising reasonable diligence.

(a) I am unconvinced with this legal proposition in this case, which involves impeachment of a judgment secured under fraudulent circumstances *via* separate collateral and original action.

(b) it is not an action to adduce fresh evidence in the same action where the impugned judgment originates.

(c) there is no such requirement in the circumstances.

(d) nevertheless, it was established that:

(a) The plaintiff gave evidence even if he had used reasonable diligence, he could not have discovered the new evidence of fraud by YNS.

(b) He had no cooperation from Kwong Tong Cemetery to get the necessary information.

(c) PW5: Lau Hor Seng: L125: a Contractor, Thiam Leong Graveyard Landscape, gave evidence at the trial:

(i) That it was impossible to locate the grave at Kwong Tong Cemetery without the burial plot number and personal details of the deceased.

(ii) Without the Kwong Tong Map and Zoning Map (L.150 Tab 1 and Tab 2, PDF pp. 4-5 and pp. 6-7), locating a grave in the 250-acre cemetery would be impossible.

(iii) When PW5 was shown the photographs adduced by YNS of the tombstone of Madam Tham at burial plot 23455, he noticed visually that it was not old but could not locate the grave. He also could not find the tombstone of Yap Chin Fook at burial plot 15457, from the evidence of YNS in Suit 676, 2015.

(iv) He could only locate both fabricated tombstones when a worker (Kit Chai) at the cemetery took him to the location. Kit Chai informed him that in 2014, Kit Chai and his late father were instructed by their boss, Chow Tang Choy, to fabricate the two tombstones. *PW5 told the plaintiff of the discovery in August 2018.*

(d) Therefore, the discovery of the new evidence in the circumstances was after appeal 2558 and not before, as alleged by the defendant. In reality and on record, the Court of Appeal never considered this new evidence.

(e) Failure to call Kit Chai and Chow Tang, does not prevent the plaintiff by any legal reasoning from using this new evidence to impeach the impugned HC Judgment.

(f) I take cognisance that:

(i) That PW6: Rashidah binti Md. Rashid: Subpoena Witness Jabatan Pendaftaran Negara corroborated the evidence of the PW7/plaintiff on the identity of YNS's father as unrelated to Madam Sam Poh San @ Shum Poh Sum. There was no rebuttal evidence from the defendant to negate this evidence save for unsupported and speculative. The Court does not act on speculation.

(ii) The evidence of PW2: Wey Jiun Horng: Subpoena Witness, Administration Manager, Kwong Tong Cemetery Management; PW4: Yap Chee Sun: L111: Land Survey Technician, and PW5: Lau Hor Seng: L125: Contractor, Thiam Leong Graveyard Landscape corroborated each other, on the precise location and identity of the impugned genuine tombstones as set out in the evidence of PW7/ plaintiff.

(iii) Illuminate the issue of the fraudulent tombstones used by YNS in Suit 676, 2015, to support his claim. Similarly, there is no rebuttal evidence from the defendant save for suggestive and bare assertions.

(iv) It did not bode well for the defendant when he admitted in evidence that he was not acquainted with the facts contained in his Amended Witness Statement as being the input of his counsel. Simply put, he had no personal knowledge of the events unfolding.

(g) In *Benjamin William Hawkes v. PP* [2020] 8 CLJ 267 the Federal Court held:

(5) … It is trite law that even in cases of evidence obtained illegally, its admissibility is unaffected as the issue is actually relevancy. (para 67)

In the case of *Kuruma v. R* [1955] AC 197, CJ Lord Goddard said:

The test to be implied in considering whether evidence is admissible is whether it is relevant to the matters in issue; if it is, it is admissible, and the Court is not concerned with how evidence was obtained. This evidence, taken in together with all other evidence adduced in this suit, establishes fraud in the present case.

In *Dubai Aluminium Company Ltd v. Al Alawi & Ors* [1999] 1 Lloyd's Rep. 478, Queen's Bench (Commercial Division), Justice Rix observed that:

(i) Strong interest in combating criminal and fraudulent behaviour and in protecting the victims of such acts by deciding cases justly in the light of all available evidence.

(ii) To rule against the evidence, the party employing criminal or fraudulent behaviour would have the power to decide which information he was willing to rely on and disclose and which he was not.

(iii) Where such a party will be asking the Court to make inferences from such material, it is only fair that such material should be seen as a whole.

A (iv) Rix J held that this decision was consistent with *Kuruma* as the Court would be able to make a decision based on all of the evidence rather than that chosen selectively by the party indulging in criminal or fraudulent behaviour.
(emphasis added)

B (iv) the defendant raised the issue that the plaintiff:

(a) failed to plead the commission of fraud by YNS with particularity, especially the alleged timing of the discovery of Madam Shum Poh Sum and Yap Chin Fook's genuine tombstones, as it contradicts the records before this court. The C evidence at the trial, however, shows otherwise. The position taken by the defendant is indeed untenable.

(b) the defendant insisted that the discovery of the new evidence of fraud happened before the dismissal of Appeal 2558, and it cannot be raised now. However, based on the evidence at the D trial, I am convinced that the plaintiff sufficiently explained the discovery of the new evidence on fraud by YNS in his evidence. I cannot find any probable cause to doubt the veracity of that evidence. These matters were never canvassed and ventilated before the High Court or the Court of Appeal.

E (c) the defendant argued that in not appealing the dismissal of Appeal 2588 to the Federal Court, the plaintiff is deemed to have accepted the determination by the High Court and the Court of Appeal. It is, therefore, final and binding on the parties. Such a legal position is valid under normal circumstances but F hardly applies to the present case. The present suit is a collateral original action to impeach the impugned HC judgment founded on fraud. It is entirely a fresh action. I do not accept the proposition that fraud can be waived by acquiescence. Fraud remains fraud in any given circumstances.

G (d) the defendant argued that YNS would not be able to answer these charges of fraud upon his death. Therefore, the plaintiff's filing of this action is a tactical manoeuvre. I find this proposition to be untenable in the circumstances of the case. It is the duty of the defendant as the administrator of the YNS H estate to offer credible evidence to negate or refute the new evidence of fraud by the plaintiff, which he failed to do.

(e) the defendant further argued that the plaintiff's pleadings were unclear as to who committed the fraud (YNS alone) or in collusion (with his servants or agents without identifying them). I Allegedly, there are serious defects in the plaintiff's pleadings. However, the pleadings do not leave me with any ambiguity

since it is clear that the action is against YNS for committing fraud upon the court. If and when that judgment is impeached and set aside, it will restore all parties to their original positions. The issue of loss suffered by 11 other beneficiaries created after the impugned HC judgment, therefore, does not arise.

(v) the defendant further alleges that the plaintiff was conducting his litigation by instalments, and the present suit is the third bite of the cherry. However, the plaintiff informed the court that the defendant unsuccessfully raised this argument in Appeal 306.

(vi) the defendant further argued:

(a) if YNS were to erect the two fraudulent tombstones, he could have inscribed the details that match the Kwong Tong Cemetery records to avoid litigation.

(b) it is illogical for YNS to fraudulently erect the fraudulent tombstones in early 2000 and wait for 15 years before commencing Suit 676, 2015.

It is trite that the court does not deal with speculative evidence, and there is no evidence that the Kwong Tong Cemetery has authorised the erection of the fraudulent tombstones.

(vii) the defendant tried to cast doubt on the lineal linkage of the plaintiff to Madam Shum, alleging there was no evidence of that biological nexus at the trial of Suit 676, 2015. However, the evidence in Suit 676, 2015, confirmed that Madam Shum Poh Sum is the mother of Yap Fatt Yew, the grandfather of the plaintiff. The court in Suit 676, 2015, had affirmed the lineal linkage between the plaintiff and Madam Sam Poh San @ Shum Poh Sum.

(viii) the defendant argued on the issue of *res judicata* doctrine in a broader sense and cited *Yow Man Kong v. Ghandirajan Arjunan & Anor* [2023] 3 CLJ 503, where the Court of Appeal dismissed the two motions to set aside the judgment allegedly tainted with illegality or fraud. Ghandirajan then instituted a fresh action to impeach the judgment under s. 44 of the EA 1950:

(a) The learned JC at the High Court allowed the impeachment.

(b) On appeal, the Court of Appeal set aside the High Court findings.

(c) it was found that issues raised in the impeachment proceedings are part of the subject matter of litigation and could have been raised in the previous suit.

(d) Ghandirajan is estopped by *res judicata* in a broader sense to seek to set aside the earlier judgment by accusing the appellant of fraud/misleading. (emphasis added)

A However, after I had perused the Court of Appeal's reported judgment, it was stated that:

(a) *res judicata* did not apply to a claim to impeach or set aside the previous judgment because it was obtained by fraud. It affirmed the legal position, as mentioned in many Federal Court authorities, that *res judicata* is irrelevant in determining fraud in procuring the previous judgment.

B

(b) *res judicata*, in the broader sense, only applies to specific instances of illegality as addressed by the Federal Court in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393.

C

(c) the Federal Court in *Hock Hua Bank Bhd v. Sahari Murid* [1980] CLJU 92; [1980] 1 LNS 92; [1981] 1 MLJ 143 observed that the issue of illegality must be pleaded and argued before the court of first instance; otherwise, *res judicata* would apply in a suit to set aside the judgment.

D

(d) I do not doubt finding it does apply in the present case.

(ix) the defendant:

E

(a) attempted to cast doubt on the veracity of the record of Jabatan Pendaftaran Negara concerning the father of Yap Hong being Yap Hing and not Yap Chin Fook. Suggestive and bare statements cannot challenge the veracity of the records that remained conclusive before the court. At the risk of repeating myself, PW6 from JPN corroborated the evidence of the plaintiff on the identity of YNS's father as unrelated to Madam Sam Poh San @ Shum Poh Sum. There was no rebuttal evidence from the defendant to negate this evidence save for unsupported and speculative. The court does not act on speculation.

F

G

(b) the defendant also argued that there must be finality in litigation, and the plaintiff must not be allowed to prosecute his litigation by instalments: *Flower v. Lloyd* [1878-79] 10 Ch D 327 cited and followed in *Seng Huat Hang Sdn Bhd & Ors v. Chee Seng & Co Sdn Bhd* [1987] 1 MLJ 413.

H The defendant, therefore, asks that the plaintiff's claim be dismissed with costs.

The Law On Impeachment Of Judgment And Fresh Evidence

[8] In a nutshell:

I

(i) section 44 of the Evidence Act 1950:

> Fraud or collusion in obtaining judgment or incompetency of court may be proved.
>
> *44. Any party to a suit or other proceeding may show that any judgment, order, or decree which is relevant under section 40, 41 or 42, and which has been proved by the adverse party, was delivered by a court not competent to provide it or was obtained by fraud or collusion.*
>
> (emphasis added)

Where the court has no jurisdiction to pronounce the judgment, the party against whom the judgment is made can file a collateral proceeding to set aside the judgment or order. A judgment or order obtained by fraud cannot be said to be a judgment or order in law.

(ii) the Federal Court in *Seruan Gemilang Makmur Sdn Bhd v. Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 CLJ 1; [2016] 3 MLJ 1, affirmed and restated the following principles:

(a) it is trite that the impeachment action should be, by the way, a fresh action and not in the same action where the impugned earlier judgment was made: *Hock Hua Bank Bhd v. Sahari Murid* [1980] CLJU 92; [1980] 1 LNS 92; [1981] 1 MLJ 143, Chang Min Tat FCJ ruled that:

> *… if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment …* (emphasis added)

(b) The respondent's claim in the present case was a fresh action based on fresh evidence that could not have been obtained at the earlier trial.

In coming to its conclusion, the Federal Court in *Seruan Gemilang* opined that:

(i) *The Court has jurisdiction to set aside a judgment obtained by fraud in a subsequent action brought for that purpose. Such impeachment action must be by way of fresh action and not in the same action where the impugned earlier judgment was made, and*

(ii) *The doctrine of res judicata is not applicable in an action to impeach or set aside an earlier judgment which has been obtained by fraud. It is settled law that since the doctrine of res judicata is designed to achieve justice; the court should decline to apply it if its application would lead to an unjust result.* (emphasis added)

(iii) it must be established at the trial:

(a) the evidence of the fraud could not have been procured with reasonable diligence at the original hearing: *Hock Hua Bank Bhd v. Sahari Murid* [1980] CLJU 92; [1980] 1 LNS 92; [1981] 1 MLJ 143;

(b) particularisation of the fraud must be proven according to the burden that it requires by law: *Zung Zang Wood Products Sdn Bhd & Ors v. Kwan Chee Hang Sdn Bhd & Ors* [2014] 2 CLJ 445; [2014] 2 MLJ 799:

> *In relation to pleadings in general, the rules of court require a pleading of fraud to contain particulars of the fraud on which the party pleading relies (see … O. 18 r. 12(1)(a) of the Rules of the High Court 1980, now Rules of Court 2012). When fraud is alleged, it must be specifically pleaded. The mere allegation of fraud without showing facts to support it is not a matter to which the court will pay serious attention …*

(c) it must be actual fraud: *Patch v. Ward* [1867-68] LR 3 Ch App 203. Lord Cairns LJ opined:

> *…. The fraud there spoken of must clearly, as it seems to me, be actual fraud, such that there is on the part of the person chargeable with it the malus animus, the mala mens putting itself in motion and acting to take undue advantage of some other person for the purpose of actually and knowingly defrauding him.* (emphasis added)

(iv) the Court of Appeal in *K Ramalingam Krishnamoorthy & Ors v. Mohammad Razin Abdullah & Anor And Other Appeals* [2017] CLJU 80; [2017] 1 LNS 80; [2017] 3 MLJ 103, observed that:

(1) The plaintiffs' claim *via* the fresh action was premised on s. 44 of the Evidence Act 1950 ('the EA'), which allowed a judgment of the court to be impugned, *inter alia*, for fraud or collusion. Notwithstanding her reproduction of s. 44 of the EA, the judge appeared to have focused on the party affairs and the 2013 re-elections than on whether fraud was practised in the JR applications. The fresh action was not a plain and obvious case for striking out, and the judge's error in failing to give due regard to the nature of the plaintiffs' claim under s. 44 of the EA. The fresh action was remitted to the High Court for trial.

(2) Whether or not the plaintiffs were members or otherwise of MIC was irrelevant as the plaintiffs were seeking to impugn the JR applications premised on fraud or collusion perpetrated on the court. The issue of membership, the 2013 re-elections, and part affairs were secondary to whether fraud had been committed in the court. Even assuming the membership issue was relevant to the facts and circumstances of the instant case, the issue required mature consideration. More importantly, fraud was a matter to be established at trial.

(3) The argument that the plaintiffs have not suffered loss personally was irrelevant to the issue of whether fraud or collusion has been perpetrated on the court. In any event, a claim shall not be defeated by misjoinder or non- joinder of parties, and the judge appeared to have overlooked the fact that the plaintiffs' claim was premised on s. 44 of the EA, which entails a different consideration from the torts of conspiracy to injure.

(6) The facts, as pleaded, disclosed a *prima facie* case that required an answer, particularly given that there was no denial of many of the salient facts. This fact, taken cumulatively, could not be said to be 'obviously sustainable' for a striking-out application. Although the judge had set out the facts, Her Ladyship failed to address her mind to the issue of whether the facts underlying the plaintiffs' claim warranted investigation by way of a full trial. *The approach of the judge in finding summarily that the incriminating evidence would not have influenced the decision in the judicial review applications was erroneous.*
(emphasis added)

(v) the parties must be aware that it is not easy to establish an impeachment of a regular judgment of a court of unlimited jurisdiction. The court must be vigilant to ensure that s. 44 of the EA 1950 is not used to abuse the process of the court save in genuine cases. The Federal Court in *Ang Game Hong & Anor v. Tee Kim Tiam & Ors* [2020] 1 CLJ 141; [2019] 6 MLRA 477, observed that:

(a) It is settled law that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction.

(b) However, where the High Court's final judgment could be proved null and void because of illegality or lack of jurisdiction, it could be attacked collaterally in a separate proceeding *ex debito justitiae*.

(c) An order made in breach of natural justice is such an order.

(d) A challenge on the validity of another High Court order must be impugned in a direct and specific proceeding filed for that purpose.

(e) It cannot be challenged by merely raising it as a defence to an action to preserve the sanctity and finality of a court order.

[9] The Federal Court cases stating the principle of impeachment and adducing new evidence apart from the above citations are (among others):

(i) the Federal Court in *Hock Hua Bank Bhd v. Sahari Murid* [1980] CLJU 92; [1980] 1 LNS 92; [1981] 1 MLJ 143 observed that:

(a) The Court has no power under any application in the same action to alter, vary or set aside a judgment regularly obtained after it had been entered or an order after it has been drawn up, except under the slip rule, so far as necessary to correct errors in expressing the intention of the court unless it is a judgment by default made in the absence of a party at a trial or hearing.

(b) If a judgment or order has been obtained by fraud or where further evidence could not have possibly been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment.

A (c) In this case, the learned judge had no discretion to set aside his own decision, and the original order must be restored, leaving it to the respondent to take out a fresh action to set aside the order on the grounds of fraud.

(ii) the Federal Court in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian*
B *Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393, observed that:

(a) One High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction.

(b) The exception to this rule is where the judgment of the High Court could be proved to be null and void on the ground of illegality or
C lack of jurisdiction to bring the aggrieved party within the principle laid down in the Privy Council case of *Isaacs v. Robertson* [1985] AC 97 where Lord Diplock:

(i) Upheld the existence of a category of court orders in which an affected person by the order is entitled to have it set aside
D *ex debito justitiae* to exercise the court's inherent jurisdiction.

(ii) Without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity and give the judge discretion as to the order he will make.

(iii) The privy Council emphasised that the courts have not closed
E the door as to the type of defects in the final judgment of the court that can be brought into the category that attracts *ex debito justitiae* the right to have it set aside without going into the appeal procedure.

(iv) Except that it includes explicitly orders obtained in breach of the
F rules of natural justice.

(iii) the Federal Court in *Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd* [2013] 6 CLJ 673; [2013] MLJU 665, involving an HC decision to strike out the appellant's suit. An appeal to the CA was dismissed. In the FC, it was argued that even if there was fresh evidence of fraud, the
G respondent could not apply to the same HC in the same proceedings to strike out the default judgment where it had been affirmed by the CA and the FC. A fresh suit to collaterally attack the judgment was required in the circumstances. The Federal Court observed that:

(a) The HC should have dismissed the application set aside as it was
H inherently defective and unknown under the RHC 1980. The Court must have regard to all surrounding circumstances concerning the plea.

(b) The application to adduce fresh evidence was a misguided endeavour in the circumstances, as the affidavit revealed that the
I so-called fresh evidence was not at all fresh evidence that could be made readily available with little effort to support the contention on the allegation of fraud.

(c) Once a regular judgment or order had been perfected, the court was *functus officio*. The matter was thus *res judicata* and cannot be relitigated, as the appellate and apex court had determined it.

(iv) the Privy Council in *Tay Bok Choon v. Tahansan Sdn Bhd* [1987] 1 CLJ 441; [1987] CLJ (Rep) 24; [1987] 1 MLJ 433, observed that:

(a) the PC observed that in civil proceedings, the trial judge has no power to dictate to the litigant what evidence he should tender. A trial judge cannot refuse to read affidavits which have been properly sworn in, filed, and produced to him unless some opposing party has applied for attendance for cross-examination of the deponent and that application has been granted, and the deponent did not attend.

(b) if allegations are made in affidavits by the petitioner and the respondent's affidavits credibly deny those allegations, then in the absence of oral evidence or cross-examination of the deponent, the judge must ignore the disputed allegations and decide the fate of the petition by consideration of the undisputed facts.

(v) the English Court of Appeal in *Ladd v. Marshall* [1954] 3 All ER 745 laid down a landmark decision on introducing and admitting further evidence in a case where a final judgment had been rendered. To justify the reception of further evidence, three conditions must be fulfilled:

(a) It must be shown that the evidence could not have been obtained with **reasonable diligence** at the trial.

(b) The evidence must be such that, if given, it would have an **important influence** on the result of the case, though it may not be decisive.

(c) The evidence must be such as is presumably to be believed, or in other words, it must be **apparently credible,** though it need not be incontrovertible.

(emphasis added)

(a) this decision was cited and followed by the Federal Court in *Lau Foo Sun v. Government Of Malaysia* [1970] CLJU 56; [1970] 1 LNS 56; [1970] 2 MLJ 70.

(b) the Rules Committee eventually codified it into r. 7(3A) of the Rules of the Court of Appeal 1994, which was mirrored in O. 55 r. 5A of the Rules of the High Court 1980 and finally O. 55 r. 7 of the Rules of Court 2012.

(c) rule 7(3A) of the Rules of the Court of Appeal 1994:

(3A) At the hearing of the appeal, further evidence shall not be admitted unless the Court is satisfied that -

(a) At the hearing before the High Court or the subordinate court, as the case may be, the new evidence was not available to the party seeking to use it, or that **reasonable diligence** would not have made it so available; and

A (b) The new evidence, if true, would have had or would have been likely to have had **a determining influence** upon the decision of the High Court or the subordinate court, as the case may be. (emphasis added)

Findings

B **[10]** I have examined all cause papers, the evidence and/or the lack thereof at the trial, and the parties' respective submissions in canvassing for their position in the present suit. Considering my observation in the totality of the evidence and in the parties' respective submissions in paras. [2] (i) to (vii), [3] (i) to (vii), [6] (i) to (x), and [7] (i) to (ix) hereof, in addition to, it is my C considered determination from the evidence that the plaintiff has on a balance of probabilities has discharged the burden to establish his claim against the defendant as set out in its SoC founded on s. 44 of the Evidence Act 1950 (fraud or collusion in obtaining a judgment).

D (i) the defendant failed to produce compelling or persuasive evidence to tilt the evidential scale in his favour in disputing this collateral action by the plaintiff. The circumstances of the case show that YNS secured and produced false evidence in court while canvassing for his position in Suit 676, 2015. YNS's evidence, proven false or fictitious in the present proceeding, ultimately led to granting the impugned HC judgment in E Suit 676, 2015, the subject matter of impeachment in the present suit.

(ii) I am guided by the principles held by the Federal Court in *Seruan Gemilang Makmur Sdn Bhd v. Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 CLJ 1; [2016] 3 MLJ 1, that the court has jurisdiction to set aside a judgment obtained by fraud in a collateral action brought F for that purpose. It is trite that the doctrine of *res judicata* is not applicable in a separate and original action to impeach and set aside an earlier judgment which has been obtained by deception or under fraudulent circumstances practised upon the court.

G (iii) I am also guided by the Federal Court in *Hock Hua Bank Bhd v. Sahari Murid* [1980] CLJU 92; [1980] 1 LNS 92; [1981] 1 MLJ 143, that observed a judgment or order obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh collateral action will lie to impeach the original judgment.

H **[11]** It is trite in law that all cases are decided on the legal burden of proof being discharged. It is the acid test applied in any particular case. The Federal Court in *Johara Bi Abdul Kadir Marican v. Lawrence Lam Kwok Fou & Anor* [1980] CLJU 199; [1980] 1 LNS 199; [1981] 1 MLJ 139, ruled that I it was all a matter of proof and that until and unless the plaintiff has discharged the onus on her to prove her case on a balance of probabilities, the burden did not shift to the defendant. No matter if the defendant's case

was completely unbelievable, the claim against him must, in these circumstances, be dismissed. The Court of Appeal in *Tradewinds Properties Sdn Bhd v. Zulhkiple A Bakar & Ors* [2019] 2 CLJ 261; [2019] 1 MLJ 421 observed that fraudulent allegations must be proven by sufficient evidence because a mere accusation is no evidence.

Moreover, fraud is not presumed; it must be confirmed by clear and convincing evidence. The burden of proof is still the civil burden of proof on the balance of probabilities. In considering the pertinent facts before me, in particular, the arguments of the plaintiff in para. [6] (i) to (x) hereof in support of the facts in para. [2] (ii) to (vii) hereof, I find no hesitation in holding for the plaintiff.

(i) it is my considered judgment:

(a) anchored on the preceding principles by the Federal Court, the plaintiff discharged its burden of proof and I find the new evidence of fraudulent endeavour by YNS, his agents, or servants to deceive the court in Suit 676, 2015, compelling and tenable.

(b) to avoid misperception, I am mindful that this suit is not a rehearing of Suit 676, 2015, *via* the introduction of new evidence but a fresh and original action to impeach a judgment of the High Court of coordinate jurisdiction founded on fresh evidence on fraud.

(c) in such circumstances as the plethora of authorities had shown, the court is inherently empowered to impeach and set aside a judgment impaired by fraud by the use of a fresh, original collateral action: *Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd* [2013] 6 CLJ 673; [2013] MLJU 1654.

(d) I find that the plaintiff had (1) used reasonable diligence in securing the fresh evidence in this suit as it was uncovered after the trial of Suit 676, 2015, (2) the evidence on the fraudulent endeavour has an important or crucial influence on the result of this case, and (3) the evidence is credible enough to impeach the impugned HC judgment, that is contrary to the unsupported denial by the defendant.

(e) in those circumstances, I agree with the plaintiff's arguments that there is no diligence requirement to produce evidence of fraud in this fresh suit as it is not a rehearing of Suit 676, 2015, to introduce fresh evidence. The UK Supreme Court in *Takhar v. Gracefield Developments Limited And Others* [2019] 3 All ER 283 observed that a litigant is entitled to have a prior judgment set aside if they can show that it had been obtained by fraud. There is no necessity to show that the fresh evidence relied upon could not have been obtained without reasonable diligence.

A (f) that said, I appreciate the difficulty and obstacles, (among other things, the language barrier, the accuracy of old historical records, verification of facts, securing tenable evidential materials, time constraints, willing and unwilling parties, and financial implications), encountered by the plaintiff in uncovering and
B presenting compelling evidence of fraudulent practices upon the court. Indeed, it is not easy where fraud and deception are involved. That alone is a sufficient testament to the plaintiff's persistence, unwavering effort, and diligence concerning the fresh evidence of fraud upon the court by YNS from 2015 to 2024 from the High
C Court to the appellate and apex court and back to the High Court.

(g) in this suit, the reliance on new evidence on the fraud committed by YNS does not concern the legal principles in r. 7(3A) of the Rules of the Court of Appeal, mirrored in O. 55 r. 5A of the RHC 1980, or O. 55 r. 7 of the RC 2012.

D (ii) I take guidance from the Court of Appeal in *K Ramalingam Krishnamoorthy & Ors v. Mohammad Razin Abdullah & Anor And Other Appeals* [2017] CLJU 80; [2017] 1 LNS 80; [2017] 3 MLJ 103, that observed where the learned HC Judge, in that case, adopted an approach of making a finding summarily that the incriminating evidence would
E not have influenced the decision in the judicial review application was erroneous. The court should have appropriately looked into it.

[12] Having considered all the facts, in line with the observation of the Federal Court in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393, that it is incumbent on the
F presiding judge to direct his or her mind sufficiently to consider all fundamental issues in determining whether the application to impeach falls within the category of cases that attract *ex debito justitiae*. I find that:

(i) a proven fraudulent or untruthful claim over supposed rights or interests in the estate of Madam Sam Poh San @ Shum Poh Sum would not entitle
G or bestow YNS or his estate with such interest or rights.

(ii) YNS came to court to plead his case with tainted hands. No court will allow a person to keep an advantage obtained by fraud. The court is careful not to find fraud unless it has specifically been pleaded and
H proved. Once proven, it vitiates judgments, contracts, and all transactions: Lord Denning in *Lazarus Estates Ltd v. Beasley* [1956] 1 All ER 341.

(iii) after examining the evidence of the fraud committed by YNS upon the court in Suit 676, 2015, I find it compelling and credible enough to
I negate and refute YNS's arguments in that trial, where it has a determining influence on the outcome of this suit.

(iv) the evidence of fraud perpetrated by YNS adduced by the plaintiff herein remained unrefuted throughout the trial of the present suit by the defendant:

(a) I take cognisance that no witnesses with personal knowledge of the facts were called to offer evidence on the facts.

(b) the defendant, DW1, admitted during cross-examination that he has no personal knowledge of the evidence he purports to give in his amended statement of defence and counterclaim.

(c) what was stated in his amended witness statement originated from what his lawyers had provided.

(d) I take exception to this conduct by counsels in preparing for the case. The trite law is that as an officer of the court, the counsel's duty is always to the court first in being truthful and forthcoming with the facts to be introduced by the witness, not to lead or feed them information which the witness is not privy to. Such evidence has no weight attached to it: *Bhavanash Sharma Gurchan Singh Sharma v. Jagmohan Singh Sandhu & Another Appeal* [2024] 1 CLJ 368: solicitors are first and foremost the officers of the court before they are the protectors of the interest of their respective client.

(e) the Federal Court in *Tindak Murni Sdn Bhd v. Juang Setia Sdn Bhd & Another Appeal* [2020] 3 MLJ 545, FC observed that advocates and solicitors are officers of the court. Their overriding duty is to the court, not their clients. They must provide honest and complete submissions. Integrity is of the utmost importance in advocacy, written or oral.

[13] Therefore:

(a) the burden shifts to the defendant to negate the plaintiff's fresh evidence on the fraudulent endeavour of YNS in Suit 676, 2015. After considering the defendant's arguments in paras. [7] (i) to (ix) hereof, by and large, it is my judgment that I find no merits in the defendant's arguments.

(b) the defendant cannot negate the new evidence of fraud committed by YNS upon the court in Suit 676, 2015, with compelling evidence.

(i) consequently, as observed by the Federal Court in *Ang Game Hong & Anor v. Tee Kim Tiam & Ors* [2020] 1 CLJ 141; [2019] 6 MLRA 477, where the High Court's final judgment could be proved null and void because of illegality or lack of jurisdiction, it could be attacked collaterally in a separate proceeding *ex debito justitiae*, as in the present suit by the plaintiff. The Court of Appeal held in *Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd* [2001] 2 CLJ 321; [2001] 4 MLJ 346 that whether *res judicata* should be allowed to arrest a matter is dependent on the facts of each case, having regard to where the justice lies. A judgment may be impeached for deliberate fraud practised upon the court. The CA found that the appellants' complaints were never looked into, and the evidence was not challenged.

(ii) evidence of the actual fraud by YNS upon the court was never canvased and ventilated during the trial of Suit 676, 2015. In trite law, a judgment or order obtained by fraud cannot be a judgment or order in law.

(iii) the evidence of the fraudulent endeavour of YNS captured in paras. [6] (iv), (v), and (vi) hereof collectively, completely refutes and negates YNS's claim of familial lineage with Madam Sam Poh San @ Shum Poh Sum as his great-grandmother in Suit 676, 2015.

(a) it compellingly dismantled the foundation and the main structure from YNS's claim in Suit 676, 2015, leaving it without a credible foundation to stand on.

(b) it establishes the falsity and deceit by YNS upon the court in an attempt to grab a slice of the estate of Madam Sam Poh San @ Shum Poh Sum when he had no familial linkage to do so.

(c) grounded on this fraudulent endeavour, YNS was bold enough to attempt to remove the plaintiff from the estate of his great-grandmother by casting doubt on the plaintiff's lineage even when the High Court in Suit 676, 2015 had made a finding of fact that the plaintiff is a lawful heir to the estate of the late Madam Sam Poh San @ Shum Poh Sum.

(d) YNS's fraudulent endeavour subsequently uncovered after the trial of Suit 676, 2015, and the Court of Appeal: Appeal 2558 by the plaintiff certainly cannot be ignored or dismissed by the court premised on the defendant's unsustainable argument on the concept of finality in litigation.

[14] The Federal Court in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393, observed that:

(a) Apart from a breach of rules of natural justice, any attempt to widen the door of the inherent and discretionary jurisdiction of the superior court to set aside an order of court *ex debito justitiae* to a category of cases involving orders which contravened any written law, the infringement should defy a substantive statutory prohibition to render the defective order *null and void on the grounds of illegality or lack of jurisdiction.*

(b) *The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional circumstances where the defect is of such a severe nature that there is a real need to set aside the defective order to enable justice to be upheld.* (emphasis added)

Conclusion

[15] All things considered:

(i) it is my considered judgment that the plaintiff has succeeded in proving his claim:

(a) considering all cause papers, the evidence at the trial, the oral testimonies of the witnesses and supported by documentary evidence as well as the parties' respective submissions, I find no hesitation in holding that the impugned HC judgment had indeed been procured by fraudulent means, which would vitiate it. In the circumstances, the plaintiff's claim is allowed with costs.

(b) I find no plausible merits to support a justifiable and tenable foundation for the defendant's counterclaim in L.20. It is dismissed with costs.

(ii) accordingly, a final judgment against the defendant is ordered. The following orders are hereby entered:

(a) it is hereby ordered that the impugned HC judgment that stands impeached be set aside immediately.

(b) the Registrar of the High Court is directed to remove the defendant from the grant letters of administration of the estate of the late Madam Sam Poh San @ Shum Poh Sum as an administrator and/or beneficiary immediately, together with the names of any of his siblings and relatives who had become named as beneficiaries.

(c) an injunction is hereby issued to permanently restrain YNS siblings and/or the beneficiaries from acting or holding themselves out as the beneficiaries of the estate of Madam Sam Poh San @ Shum Poh Sum.

(d) the estate of the defendant is directed to surrender and deliver to the plaintiff all materials and/or assets (if any) belonging to the estate of Madam Sam Poh San @ Shum Poh Sum within 14 days from today.

(e) the estate of the defendant is to refund all costs awarded and/or collected during the hearing in the High Court in Suit 676, 2015 and the Court of Appeal within 14 days from today.

(f) costs are awarded to the plaintiff for (1) on the present claim and (2) for the dismissal of the defendant's counterclaim payable by the estate of the defendant within 14 days from the date hereof.

Global cost in the amount of RM120,000 (including the two earlier interlocutory applications) is awarded to the plaintiff, to be paid within 30 days from today.

Cost in the amount of RM500 is awarded to the third defendant to be paid within 30 days from today.